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June 2, 1997

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JUN - 3 1997

Federal Communications Commission  
Office of Secretary

## VIA HAND DELIVERY

William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Washington D.C. 20554

Re: *MM Docket No. 97-106; RM-9071*  
(Cheyenne, Wyoming and Gering Nebraska)

Dear Mr. Caton:

Enclosed please find the Reply Comments of Tracy Broadcasting Corporation ("Reply") in the above-referenced docket.

In accordance with Commission Rule 1.420, Tracy Broadcasting Corporation ("Tracy") is submitting the Original and four copies of its Reply, and a copy marked "Stamp & Return". Tracy is also providing a copy of the Reply to the petitioner, to Montgomery Broadcasting LLC (another commenter) and a courtesy copy to Ms. McDonald of the Mass Media Bureau.

Please acknowledge receipt of the enclosed Reply by date-stamping the enclosed copy marked "Stamp & Return" and returning it to our courier.

Please contact me with any questions.

Yours truly,



Harsha Krishnan

## Enclosure

cc: Elizabeth A. Sims, Esq.  
Ms. Sharon P. McDonald  
Montgomery Broadcasting LLC  
Tracy Broadcasting Corporation

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

*In the Matter of*  
Amendment of Section 73.202(b),  
Table of Allotments, FM Broadcast Stations.  
(Cheyenne, Wyoming and Gering, Nebraska)

MM Docket No. 97-106  
RM-9071

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**REPLY COMMENTS OF TRACY BROADCASTING CORPORATION**

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Tracy Broadcasting Corporation ("TBC"), by and through its attorneys, files these Reply Comments ("*Reply*") responding to the comments filed by TSB II, Inc. ("TSB II") and Montgomery Broadcasting Limited Liability Company ("Montgomery") on the Commission's March 19, 1997, *Notice of Proposed Rule Making and Order to Show Cause* (DA-97-585) (the "*Notice*"). TBC replies to the comments of TSB II and Montgomery as follows:

**BACKGROUND**

1. TBC is a Nebraska corporation which holds licenses for stations KMOR-FM and KOLT(AM), Scottsbluff, Nebraska, KOAQ(AM), Terrytown, Nebraska and KOLT-FM, Gering, Nebraska. TBC also holds the FM Broadcast Station Construction Permit for unbuilt station KASX(FM), Pine Bluffs, Wyoming. In addition, TBC is the only applicant for the vacant FM channel 267C allotted to Bridgeport, Nebraska. *See Application BPH-960506MA*.<sup>1</sup>

2. Station KOLT-FM currently operates on channel 280C3, while TBC's permit for unbuilt station KASX specifies operation on channel 287C2. The Commission has allotted channel 267C for Bridgeport, Nebraska.

3. On February 25, 1997, TSB II, Inc. ("TSB II") filed its Petition for Rulemaking and Order to Show Cause (the "*Petition*"), which proposed to allot channel 280C2 to Cheyenne, Wyoming, and substituting channel 293C3 for channel 280C3 at Gering, Nebraska, and modifying station KOLT-FM's license to specify operation on channel 239C3 (the "*Proposal*").

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<sup>1</sup>TBC applied for this channel under the "first-come, first-served" procedure specified in Commission Rule 73.3564(d)(4).

4. On March 28, 1997, the Commission issued the *Notice* and directed TBC to show cause why its license for station KOLT-FM should not be modified to specify operation on channel 239C3 rather than 280C3. TBC was directed to respond to the *Notice* by May 19, 1997.

5. TBC filed its Answer to Order to Show Cause and Comments ("*Answer*") on May 19, 1997. In its Answer, TBC commented on TSB II's *Proposal*, and offered a *Counter-Proposal* that would provide first and second full-time service to 2,300 additional persons and thereby fulfill the Commission's statutory mandate to distribute radio frequencies among the several states and communities in a manner ensuring "a fair, efficient and equitable distribution of radio service". See 47 U.S.C. §307(b).

6. TSB II submitted its comments supporting the *Proposal*, while Montgomery's comments oppose the *Proposal*.

#### REPLY TO TSB II'S COMMENTS

7. TSB II's comments incorporates its *Petition* by reference and reiterates its intention to apply for the vacant station, if allotted, and reimburse TBC for its reasonable expenses to change to channel 239C3.<sup>2</sup> TBC's *Answer* commented on TSB II's *Proposal*. See *Answer* at ¶¶6-12. TBC hereby incorporates those comments by reference; for the Commission's convenience, the following discussion summarizes those comments.

8. First, contrary to TSB II's characterization of the Cheyenne FM radio market, there are actually five operating FM stations in Cheyenne, with an additional FM station proposed to be allotted.<sup>3</sup> *Answer* at ¶¶6-8. Cheyenne is not "sparsely served" but instead has vigorous competition in its local FM radio market. Thus, the public interest is being served by the current FM allotments to Cheyenne, so TBC urges the Commission to deny the *Proposal*.

9. Second, modifying KOLT-FM to operate on channel 239C3 will be difficult and expensive because KOLT-FM's antenna is side-mounted on one of the directional antennas of

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<sup>2</sup>TSB II's Motion to accept late comments states that these comments were prepared weeks ahead of time but that a clerical error delayed the filing. TBC observes that these comments were faxed from TSB II's counsel to TSB II on May 21, 1997 (two days after the filing deadline) and executed by TSB II on May 20, 1997. Accordingly, TSB II's comments were not ready for filing on the comment due date, so TSB II's comments should be rejected as untimely filed without good cause.

<sup>3</sup>*Cheyenne, Wyoming*, 61 FR 65509 (December 13, 1996) (Allotment of channel 229A to Cheyenne).

station KOLT(AM). *Answer* at ¶¶9-12. Based on discussion with its engineer and consultants, TBC estimates that the modification proposed by TSB II will cost approximately **\$100,000**. Since the *Proposal* will require KOLT-FM, an existing station, to modify its operation to use a different channel, "it is well established Commission policy that licensees and/or permittees required to change channels so as to allow a new allotment elsewhere are entitled to reimbursement." *Brookville and Punxsutawney, Pennsylvania*, 65 RR2d 493, 495 ¶9 (1988) [citing *Circleville, Ohio*, 8 FCC2d 159 (1967)]. The expenses identified by TBC are reasonable and indispensable for modifying KOLT-FM to use channel 239C3 and do not include any enhancement or modernization of KOLT-FM's facilities. Thus, if the Commission approves the *Proposal*, TSB II or any successful applicant for the new Cheyenne allotment must reimburse TBC for the significant costs entailed by modifying KOLT-FM's operations.

10. Such enormous costs warrant the Commission's rejection of the *Proposal*. Although TSB II has stated its intention to reimburse TBC for the reasonable expenses incurred in changing from channel 280C3 to 239C3 (*Proposal* ¶3; *TSB II Comments* at ¶3), TSB II obviously has not anticipated the considerable (and expensive) modifications necessary for changing KOLT-FM to channel 239C3 and the attendant disruption to KOLT-FM's operations. TSB II apparently assumes that KOLT-FM utilizes a conventional FM antenna and tower which can be modified at negligible cost. Thus, if TSB II still wishes to proceed with the *Proposal*, TSB II must comprehend the true extent and cost of its proposed modification to KOLT-FM's operations and must reiterate its willingness to pay those costs if the Commission adopts the *Proposal*. TBC should not be required to pay these costs because those costs result solely from the change in KOLT-FM's channel in order to allow the proposed new allotment and therefore must be reimbursed by TSB II. *Brookville*, 65 RR2d at 495 ¶9; *Circleville*, 8 FCC2d 159. In fact, if the *Proposal* is adopted, the Commission should direct TSB II to advance those costs rather than forcing TBC to incur the expense and hope for eventual reimbursement.

#### REPLY TO MONTGOMERY'S COMMENTS

11. Montgomery, the licensee of station KFBC(AM), Cheyenne, Wyoming, filed comments opposing the *Proposal* based on "Jacor Broadcasting's" attempt to dominate the news/talk and rock entertainment radio formats in the Cheyenne-Denver region. Montgomery asserts:

that the licensee of Radio Station KOLT-FM, Gering, Nebraska, is Tracy Broadcasting Corporation. See Report No. 43907, dated January 13, 1997. It is also Montgomery's understanding that that station is controlled by Jacor or one of its affiliates.

*Montgomery Comments* at 2 n.1. TBC is the licensee for KOLT-FM; however, contrary to Montgomery's assertion, neither Jacor nor its affiliates control KOLT-FM. TBC vehemently protests any insinuation that there has been an unauthorized transfer of control of KOLT-FM.<sup>4</sup>

#### CONCLUSION

The Commission should reject TSB II's *Proposal* and adopt TBC's *Counter-Proposal*. The *Proposal* merely adds a seventh FM station to an already competitive urban market, and will entail enormous costs for modifying the channel for KOLT-FM. TBC's *Counter-Proposal* serves higher allotment priorities than the *Proposal* and receives dispositive preferences under the Commission's policies and thus best effectuates the Section 307(b) statutory mandate. Accordingly, the Commission should adopt the *Counter-Proposal* in the public interest.

WHEREFORE, TBC respectfully requests that the Commission deny the Proposal presented by TSB II, grant TBC's Counter-Proposal, and amend the FM Table of Allotments, 47 C.F.R. §73.202(b), as requested in the Counter-Proposal.

Respectfully submitted June 3, 1997.

TRACY BROADCASTING CORPORATION

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<sup>4</sup>TBC also observes that Montgomery's assertion demonstrates the confusion resulting from the misuse of TBC's call letters "KOLT" and promotional slogans by Magic City Media, Inc., in violation of federal unfair competition laws and the misidentification of Station KOLZ-FM pursuant to Section 73.1201 of the Commission's rules, 47 C.F.R. § 73.1201, in its operation of Station KOLZ-FM. See TBC's Petition to Deny, *In re Matter of the Applications of MAGIC CITY MEDIA COMPANY and CITICASTERS CO. for Commission Consent to Assign Licenses of Stations KFBQ-FM, KOLZ-FM and KLEN(FM), Cheyenne, Wyoming*, Files BALH-970403GI and BALH-970403GH.

## CERTIFICATE OF SERVICE

I hereby certify that on June 2, 1997, I gave a true and correct copy of the foregoing  
REPLY COMMENTS OF TRACY BROADCASTING CORPORATION ("REPLY") in the U.S.  
mail, postage prepaid, addressed to the following:

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